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Alvin J. Esau*

Competition, Cooperation, or
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Canada?

Law schools in Canada are engaged in increased competition with one another and significant disparities in resources and reputations have developed. The author argues that this competitive context may be a threat to the maintenance in some schools of the broader mission of the law school to teach and produce contextual and critical perspectives on law. It is suggested that Canadian law schools should cooperate with each other and that various initiatives could be taken which would help all schools. Beyond cooperation on specific projects, the author raises the question of whether law schools should set up their own national accreditation scheme. He suggests various reasons why accreditation cannot be ignored any longer, then surveys the current ad hoc approach to accreditation by the profession in Canada, and finally provides an overview of the accreditation of law schools in the United States, focussing on the controversy of whether accreditation is a form of cartelization. The author is ambivalent about accreditation, but believes that the issue must be examined and debated as an option in the face of the disturbing trends engendered by increasing competition.

Les écoles de droit du Canada sont en proie à une rivalité sans cesse croissante qui se traduit par un écart de plus en plus important tant sur le plan des ressources que de la réputation dont elles jouissent. L'auteur dénonce cette tendance car elle risque de mettre en péril la mission première de l'école de droit qui est d'enseigner et de prodiguer un point de vue critique et une analyse contextuelle du droit. Il préconise une meilleure collaboration entre les diverses écoles et propose des initiatives qui pourraient leur être communément utiles. Au delà de la collaboration à des projets précis, l'auteur soulève la question de l'accréditation nationale des écoles de droit. Il explique les raisons pour lesquelles on ne peut plus repousser l'examen de cette question; il fait le constat de la situation décousue que nous avons au Canada. À titre comparatif, il fait un survol de l'accréditation des écoles de droit aux États-Unis et fait le point sur la controverse qui règne actuellement à savoir si l'accréditation ne constitue pas une forme de cartellisation. L'auteur ne prend pas position dans le débat, mais il estime que la question mérite que l'on s'y attarde et qu'on l'approfondisse compte tenu des répercussions fâcheuses engendrées par les rivalités actuelles.

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Introduction

We live in an era of deregulation where competition within unfettered markets is seen as a virtue and where governmental central planning and protective cartels by workers in the form of unions or by suppliers in the form of monopoly licensing schemes are increasingly disfavoured. In this market driven environment we seem to be out of step if we complain that there is too much competition and stratification between law schools in Canada and not enough cooperation and egalitarianism. If we argue that we should go beyond voluntary cooperation and actually regulate the law school market by setting collective standards for the enterprise, we are without a doubt swimming against the stream. The purpose of this paper is to provide some background information and perspectives on competition, cooperation, and accreditation so that we can make a more informed decision. Should we hop on board the competition boat that is being swept by the tide of popular opinion, or should we try to turn the boat around and go upstream? Would a formal accreditation scheme

serve as a brake on stratification and competition, and if so are there still too many potentially negative side-effects to risk adopting such a scheme?

I. Competition

It is appropriate to begin with a few remarks about competition between law schools.¹ Partly as a result of the recent surveys and rankings of law schools in Canada,² there appears to be increased competition between law schools to stay on top or move up some kind of ladder of prestige. There is increased competition between schools to recruit students, charge them higher fees, get more money from alumni, institute new programs, chairs, and institutes, and brag about job placements for graduates. However, striving after prestige may well involve engaging in image manipulation having very little to do with actual quality in terms of scholarship, teaching, and service of the school to the betterment of law and society. Perhaps what is important to many prospective law students is not the actual quality of education that a law school might provide, but rather what counts is the prestige attached to getting into a particular law school and the prestigious job opportunities available because you went to the “elite” school. The so-called “elite” employers also seem to care less about the quality of the education provided at the prestigious school and care more about the particular institution’s prestige status as a selector of the most talented prospective employees.³ Just as prestige may not necessarily correlate with quality, it does not necessarily correspond with goodness either.⁴ If law schools, to gain or hold prestige, focus their scholarship, teaching and training on areas of the law that are most attractive to that segment of the profession that almost exclusively serves the most powerful economic interests in society at the expense of other areas, have they gained prestige at the cost of doing critical scholarship, or at the cost of constructing a curriculum that has a more reformist and inclusive benefit to society overall, or at the cost of

1. While my remarks may have some application to civil law schools in Canada, my comments are made within the context of the sixteen common law schools in Canada. The Department of Law at Carleton University, which teaches law as a first degree (not LL.B.), is a seventeenth school which plays a vital role in terms of its teaching and scholarship but the thrust of my remarks are confined to education within the LL.B. programs.

2. See M. Young, “LL.B.s and Compact Disc Players: Accountability versus Marketability” (Legal Education Workshop, Winnipeg, 3 May 1999) [unpublished]. Prepublication texts of workshop papers are available online: <http://www.umanitoba.ca/faculties/law/LRI/Legal_education/> (date accessed: 18 July 2000).

3. R. Korobkin, “In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems” (1998) 77 Texas L. Rev. 403.

4. D.C. Yamada, “Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy” (1997) 31 Suffolk U. L. Rev. 249.

providing access to the legal profession for those who are not already at the top or near the top of the existing social hierarchy?⁵

So my initial reaction to all this concern about competition and ranking is to dismiss it as so much hot air between schools to create the public perception that this or that school has the “best” students, the most productive faculty, the greatest amount of endowment funding, the most powerful alumni, and the like. However, upon reflection I must admit that something more important than concern for status is at stake. While the quality of a law school should be measured against the proclaimed mission that the law school has for itself, and different schools can have different missions, nevertheless the actual differences as to quality and resources between schools cannot be dismissed as just so much hot air. It is not just a pecking order of elitism that we are dealing with, but rather serious and growing gaps between resources and program quality and academic culture from school to school. Furthermore, the reality of increased inequality as between schools is being reinforced by further competitive behaviour which may harm those schools that have less resources to begin with.

I will highlight just two trends that are connected to the competitive law school market, namely the movement from diversity to disparity, and the movement from a tension in law school mission to a possible termination of a more critical, pluralistic and contextual approach to teaching and research. Some people might argue that these trends are good and there is nothing to be worried about, while others tend to think that these trends are disturbing. In my view both of these trends are negative. However, in fairness we should note that perhaps there are some trends connected to greater competition that are positive. For example, perhaps increased competition has provided incentives for positive innovations at law schools, has created more accountability as to the quality of product delivered to consumers of legal education, has put pressure on us to build a better research culture, and so forth. My brief analysis of two negative trends should not be seen therefore as a complete assessment of the effect of increased competition.

1. Diversity or Disparity?

The first trend is what I call the movement from diversity to disparity. On one hand we might well celebrate the diversity of the legal education programs available from law schools in Canada. Some schools are small and intimate, “where everyone knows your name”. Others are huge and impersonal, but correspondingly offer a wide array of courses and

5. See W.S. Van Alstyne, Jr., J.R. Julin & L.D. Barnett, *The Goals and Missions of Law School* (New York: Peter Lang, 1990).

possibilities for concentrations. Some schools have a highly structured curriculum where all students are taken through a mandatory mix of doctrinal and skills and perspectives courses, while other schools mandate no particular path beyond the first year.⁶ Some schools are somewhat more intentionally geared to professional skills training for prospective lawyers, while other schools are more oriented to theory and public policy legal studies. There are also a wide diversity of opportunities from school to school in relation to joint degrees, clinical options, exchange programs, research institutes, co-op programs, comparative and international placements, graduate programs and so forth. Schools develop different cultures and intellectual climates, and geographic locations play a significant role in institutional character formation.⁷

In the context of common law schools, there was once a sense that we were not really radically different from one another in terms of the basic quality of legal education offered to our students, or in terms of the working conditions of academic staff, despite a healthy diversity and a modest degree of competition that has always existed in provinces with more than one law school. Canadian law schools were seen as roughly equivalent as compared with the stratified system of American law schools with a caste system of elite, near-elite, middle, and lower classifications.⁸ Now, however, whether by way of failure of leadership or particularly severe and prolonged resource starvation, or combinations of the above, some schools are in trouble, while others are seemingly thriving as never before, and indeed making claims about hierarchy and prestige not unlike those made by the most elite schools in the United States. Have we moved from a healthy diversity to a growing disparity? Do we have a disparity of educational resources, program innovations, and scholarly output comparatively from school to school to the extent that the fundamental quality of some law school programs is being questioned? Are the rankings of law schools, however poorly done at present, actually based on a real need, namely that schools now are becoming substantively disparate in quality, and students and employers should know this reality?

6. For an overview of the Manitoba curriculum, which is almost completely compulsory in both first and second year, and mandates a "balanced" selection in third year, see P.H. Osborne & A. Esau, "Curriculum Reform at Robson Hall" (1990) 19 Man. L.J. 605.

7. An overview of law schools in Canada is provided in C. Purcell, *Guide to Law Schools in Canada 1996-98* (Toronto: ECW Press, 1996).

8. The point that the five New Zealand law schools are still roughly equivalent compared to the stratified American system of legal education is made by G.S. Crespi, "Comparing United States and New Zealand Legal Education: Are U.S. Law Schools Too Good?" (1997) 30 Vand. J. Transnat'l L. 31. I would argue that this point could have been made with regard to Canadian Law schools in the not too distant past.

In a recent fundraising letter the dean of Harvard Law School stated in closing, after summarizing the prodigious scholarship of the professors and the quality of the students and the multi-millions given by alumni, "thank you for helping to make Harvard Law School what it is today—the best law school in the world."⁹ I actually believe that the dean did not intend us to interpret his statement the way we do when someone says, "The apple pie that I make is the best in the world." No, we are actually suppose to believe that Harvard Law School *is* the best in the world and the statement is not just a lot of hot air puffing up the balloon of prestige. This pretension to rank and power is sincere, even if other elite schools such as Yale or Chicago might beg to differ. In the same vein, we also read in relation to Toronto, for example, that, "the goal of the Faculty is to continue to serve as the pre-eminent centre for research and teaching law in Canada, and to be one of the top 5 or 6 great law schools *in the world*."¹⁰ In the spirit of competitive marketing and hierarchy placement within the globalization of law and legal services, we are now talking about taking on the world, not just North America, and certainly not just Canada!

It seems to me that we must at least pause in our celebration of competition and hierarchy when we realize that the glow at the top levels of the rankings is matched by a growing despair at the bottom. Some schools are implementing new initiatives such as field placements or international exchange programs, or funding new chairs or offering new courses and producing scholarship in emerging areas of the law, while other schools have not had the resources or perhaps the leadership synergy to implement any changes for a decade. True, some of these initiatives may be the flavor of the month to stay ahead of the competition, rather than fundamental change, but still the sense of despair can hardly be discounted when you get down to the most basic requirements of a law school, such as having scholars and books. You cannot get much more basic than that, whatever you conceive your mission to be.

As for scholars, in my own school we have gone through a decade of losing faculty members to extended leaves, retirements, deaths, or the bench without replacing them. This has meant that more courses have been taught by sessional instructors and that there is less synergy among those who remain in terms of maintaining a vibrant research and teaching culture. There is only now, at the end of the decade, a turning point where finally a new faculty may emerge out of the ashes. But the cost of not

9. Letter from Dean R.C. Clark to Harvard Law School Alumni (December, 1998). On file with author.

10. Purcell, *supra* note 7 at 253 [emphasis added].

having a regular supply of junior faculty members for a decade has been very high and it will be some time before faculty renewal makes a difference to the intellectual environment.

The reputation of a law school in terms of faculty is not simply a matter of numbers or renewal. Is there a growing disparity in terms of quality as measured by some combination of research output, teaching excellence, and public service? While rankings in this regard lack empirical data, and while every law school, even small ones, can identify scholars who are research leaders in their field, who have tremendous pedagogical skills, or have amazing impact in terms of community service, there is nevertheless a perception that overall some schools have been able to attract and retain top scholars better than other schools. There is a growing gap between faculty salaries at schools that have lost resources over the last decade in comparison to schools that have increased resources through tuition fee hikes and private funding. Obviously the schools that can offer faculty remuneration that is more competitive with private practice have a huge advantage in attracting and retaining staff.

No doubt geography and family connections and other factors may also come into play, but there is also a culture and context of expectations within each school that impacts on the quality and quantity of our work. At some stage, within my own experience as a law student and as a teacher, the idea that you could run a law practice from your office while being “full time” on the faculty was not an unusual pattern. While a few very talented and energetic people might still maintain a healthy research and publishing activity while doing so, for most people this pattern might more properly be called an abuse of the public trust.

Turning from teachers to books, when I began my teaching career in the 70s, I could go to our monographs collection in any particular subject and by and large we would have the leading works. This was confirmed many times over as I compared what we had with what was available elsewhere. How times have changed. A few years ago at the American Association of Law Schools convention in San Francisco I ordered desk copies of at least a dozen leading course books on Professional Responsibility from a variety of American publishers. Upon returning home I browsed through the section on Professional Responsibility in our library. We did not have even one of the more than a dozen leading course books I had selected, nor were any of them on order. While the flow of

monographs is down to a trickle, most periodical subscriptions have been canceled long ago.¹¹ If I go to the Index of Legal Periodicals and identify say 30 recent articles on a topic and then try to find them in our library, I might be lucky to get 5 out of the 30, compared with a decade ago when I would have access to at least 25 out of the 30. Over the last decade we have effectively lost our library as a research tool. It may be a practitioner's library for basic case law and legislation, but it is no longer an adequate library for scholars and law students.

My impression is that we are not in a situation where some schools have expanded their position in terms of quality while other schools have remained where they were, but rather we have some schools that have advanced at the same time that some have lost ground. While smaller schools with relatively fewer resources might still achieve high rankings in opinion polls for a time, it is my impression that over a longer period the gap between the resource rich and the poor will grow.

A more controversial issue involves the question of whether we have increased disparity, not just between law schools in terms of program initiatives, numbers and quality of faculty, and resources generally, but also as to the quality of law students. On one hand, we are increasingly experiencing more diversity in terms of the law student population and I think we should celebrate this, even though we are not content that we have come far enough in the goal of more equitable access. Quite apart from the special admissions category, the law students who are entering the program through the regular category at our school are much more diverse than a decade ago, particularly in regard to visible minorities. Canadian society is composed of a wider mix of races and cultures than ever before, and we want law schools and the legal profession to fairly represent that pluralism. My informal calculation is that this year in our entering class of 90 students, we had 30 students who were obviously non-white. This is a remarkable change from even five years ago.

However, the other side of the coin is that in a situation of dramatically reduced applications for law school, we are embroiled as never before in debates about equity, excellence and recruitment. Is there really a growing disparity between schools as to the actual or perceived quality of the students from school to school in terms of academic ability, or in terms of perceived ability to competently practice law, all of which

11. One of the courses I teach is Computer Applications, so I am well aware of the availability of periodical literature on Quicklaw, Westlaw, and Lexis, and I am also aware of the transformation of information sources in terms of the Internet and how access to information is increasingly more equitable and less dependent on hard copy. Nevertheless, there are problems of convenience of access and download costs and lack of comprehensive scope so that the lack of hard copy library resources is still a hardship on the researcher.

translates into a growing disparity as to the market values of law degrees as between schools, and an increased competition over recruitment of students and marketing of law schools?

Again one might argue that at one time law schools in Canada were not really radically different in terms of the overall perceived quality of the student body or the quality of education offered to them. The so-called "best and brightest" in terms of academics could be found at every school. The criticism could be made that the entry standards were far too exclusionary and based on false premises, but the point was that the students meeting the standards did so with a very small deviation as to standing from school to school. But for some time now the numbers of people applying to law schools has been going down each year. For the 1992/93 year we had 1085 completed applications at our school, while this past year for 98/99 we had 532.¹² That means in seven years we have seen a reduction of about 50% in the applicant pool. Not surprisingly, the index score of those who are accepted has been declining somewhat at some schools, and this within a context of increasing grade inflation, increasingly available LSAT preparation courses, and more waivers of parts of past academic records.

In the wake of these realities, some schools have the resources and high ranking to aggressively recruit and attract what they call the "best and brightest" and provide more entrance funding than other schools so as to attract the so-called "best" students. Having lower tuition fees does not necessarily give a school a competitive advantage in student recruitment. Rather, charging higher tuition fees to the majority of students within the context of offering an elite law degree, and then giving complete or substantial tuition fee rebates to a minority of needy students, gives the elite school a competitive advantage even in the special equity and diversity categories of law admission.

Obviously there is much to be said for challenging the premise of past academic success and predictions of first year grades as the ground for law school admission, as opposed to the value of equity and the remarkable influence that law graduates who are connected to minority communities can have. Quality cannot be measured by numbering individuals by index scores. We are not interested in just having the students who can get the best grades in law school, but rather we are interested in having

12. J. Baldwin, Chair of Admissions, *Report to Faculty Council 98/99*, Table A. On file with the author.

students who will influence the world.¹³ I guess if we take seriously all this competition to “get the best and the brightest”, some schools will have to be content to welcome the “second best and second brightest.”¹⁴ (The assumption being that there is not enough excellence to go around.) But whatever we think of equity and diversity, the reality of the competitive market is that some schools with high ranking will continue to find that their graduates are in great demand and increasingly so in various parts of the globe, while graduates of other schools will face difficulties as they are judged, or more likely misjudged, based on some perception of the general quality of students in the law school they graduated from.

So my point is that, even though we could debate what is perception and what is reality on a number of issues, and even though the rankings may be totally untrustworthy as a matter of methodology, nevertheless I think that there is indeed a growing disparity between schools. We can attack the surveys and rankings for all kinds of reasons, but perhaps we should also acknowledge that there are qualitative distinctions that can genuinely be made as between various law school programs and law school academic institutions. While we may have nostalgia for the rough egalitarianism that used to characterize law schools, it seems to me that the problem is not so much that we are clearly going to have a few elite law schools in Canada, but rather the problem is how all the rest of the schools are going to nevertheless survive and flourish as well.

The competition and stratification of law schools in Canada is occurring because of a complex interplay of changing forces arising from within both the academic world and the world of legal practice.¹⁵ The growing competition between schools and disparity between them does not mean that the more elite schools are somehow exploiting the less elite. However, those schools which are already winning the race will increasingly benefit, while other schools may decline even further. Those that have, are always in a better position to get more than those that have not. The question for us, it seems to me, is whether we should affirm the

13. For a thoughtful and empirical defense of affirmative action see W.G. Bowen & D. Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton: Princeton University Press, 1998). See also “The Relationship Between Equality and Access in Law School Admissions” Note (2000) 113 Harv. L. Rev. 1449.

14. In the words of a Report of the Council of the American Bar Association, Section of Legal Education and Admissions to the Bar, *Long-Range Planning for Legal Education in the United States* (Chicago: American Bar Association, 1987) at 21.

15. See H.W. Arthurs, “The Political Economy of Canadian Legal Education” (1998) 25 J. of Law and Society 14; J. Blom, “Looking Ahead in Canadian Law School Education” (1999) 33 U.B.C. L. Rev. 7.

efficiency and triumph of the market, or whether we should start taking collective action for the benefit of all, rather than engaging in increasing competition with each other.

2. *Tension or Termination?*

The second disturbing competitive trend is tension or termination? My suggestion here is that the competitive market within legal education is moving us from a tension as to our scholarly mission toward a possible termination of the broader, pluralistic scholarly side of the tension. I remember going to Ottawa back in 1983 to a National Conference on Law and Learning arising out of the Arthurs Report.¹⁶ Not long into that conference the then President of the Canadian Bar Association made some comments that captured the struggle over legal education in Canada. As I recall, the President complained about how few practicing lawyers had been invited to the conference, how the law schools were not adequately preparing lawyers for the practice of law, and how the recommendations in the Arthurs Report for more theoretical and fundamental research at law schools were misguided. What was needed was more professional skills-based education and practical research from legal scholars, said the then President of the C.B.A.¹⁷ That law schools are too academic and not doing an adequate job to train lawyers in the practical skills needed for the profession is a persistent theme in the United States also.¹⁸

My experience over several decades as a law professor is that we have always lived within a fundamental tension as to the mission of our law schools. The tension seems to be persistent. It affects our research, teaching and relationships with colleagues, students and with various other stakeholders such as the university and the profession. The tension is fundamental to the intellectual culture of the schools within which we work. While it is, of course, highly reductionist to posit a simple polarity of positions, nevertheless I think we can identify the basic tension between the mission of law schools as providing vocational competence (granting passports for entry into the profession), and the mission of

16. *Law and Learning: Report to the SSHRC by the Consultative Group on Research and Education in Law* (Ottawa: SSHRC, 1983). Professor Arthurs was the Chairperson of the Consultative Group and the report is commonly called the "Arthurs Report".

17. See J. McLaren, ed., *Proceedings* (National Conference on Law and Learning, Ottawa, 1-2 December 1983) at 20-23.

18. American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Washington: American Bar Association, 1992). Commonly called the "MacCrate Report".

schools as academic departments within the university with a mission to teach and research law from a critical and contextual public policy point of view for the benefit of all.¹⁹ To put it another way, on one hand we have the study of law for purposes of training for professional practice; the law school as the formative stage for professional competence in terms of doctrine, skills, and values.²⁰ On the other hand, we have the critical study of law and the legal profession as an academic discipline and as a legitimate part of the social sciences and humanities, where we try to increase the pool of understanding for society generally of what law is, how it arises, operates and affects various interests. Here we welcome a variety of methodological perspectives and contexts and criticisms. One can argue till one is blue in the face that the tension is a false one, and that the critical, contextual, academic study of law is in fact the most practical, but everyone knows that the tension just goes on manifesting itself year after year.²¹

It seems this tension exists in law schools despite very different structures in relation to requirements for entry into the profession. For example, one would think that in England, where law is taught to students right after high school and is taught as an undergraduate liberal arts program, while leaving the formal professional training in the hands of the Law Society or the Inns of Court, law schools would therefore be more free to focus their vision on the so-called academic side of things; on the teaching of law as a general university education. Yet William Twining makes it clear that both the student and academic cultures of contemporary English law schools are still much influenced by the model of professional training.²² The norm in Australia, which has comparatively many more law schools than Canada, seems to be that while legal education, as in England, is an undergraduate program of general education, the longer joint degree program with the LL.B. is becoming the norm. In Australia the "liberal legal studies" model is well advanced, but the push for vocational relevance is still persistent, particularly when university law schools are moving to integrate the vocational stage of education onto the LL.B. program.²³ On the other hand, one would think

19. See F.A. Allen, *Law, Intellect, and Education* (Ann Arbor: University of Michigan Press, 1979).

20. On the movement to skills training, see J.S. Webb and C. Maughan, *Teaching Lawyer's Skills* (London: Butterworths, 1996).

21. For a comparative example, see P.B.H. Birks, ed., *What Are Law Schools For?* (New York: Oxford University Press, 1996).

22. W. Twining, *Blackstone's Tower: The English Law School* (London: Sweet and Maxwell, 1994).

23. C. Parker & A. Goldsmith, "'Failed Sociologists' in the Market Place: Law Schools in Australia" (1998) 25 *J. of Law and Society* 33.

that American law schools would be particularly focused on skills training for the legal profession and generate more practical scholarship of perceived utility to the profession, given that American law schools are post-graduate schools, and given that the profession does not require a further year of professional study after law school for purposes of entering the profession. Yet it is my perception that there are lots of American curriculum developments that broaden and deepen law school teaching and a disproportionate amount of the most vibrant interdisciplinary and theoretical academic scholarship written in English arises within American law schools.

If the tension exists at either end of the structure, it is not surprising that Canadian law schools have it with abundance. We are more like the American structure in terms of being primarily post-graduate. Aside from civil law schools in Canada, where many students enter right after CEGEP, common law schools in Canada require at least two years of University, and the vast majority of students have a previous degree before entering law school. Our students are, for the most part, not interested in a general liberal education at this stage. Rather the vast majority aspire to enter the profession. They are in law school because they want to be lawyers. Yet we are closer to the English model at the other end in terms of not having the pressure to graduate complete lawyers, so to speak. There is at least another whole year of articling and bar admission courses before entry into the profession. But it seems that these structural differences do not matter that much as to the crude tension between vocational and academic impulses. Law schools everywhere live in the tension.

If this conflict between practice and academics has always been with us, what is there in the current competitive trend that is so disturbing? Well the argument could be made that in the past the tension was negotiated by those who tended to be on one side or the other, through a process of continuing dialogue. There was a kind of tug of war that affected both sides of the tension. Academic legal scholars successfully broadened and deepened and pluralized the study of law and the scholarly literature, and yet the pull from the more vocationally oriented students and staff acted as a kind of brake so that legal studies, at least at law schools, would not fly off into an orbit beyond the perceived gravitational use of the profession.²⁴ But at the same time, on the other side of the coin,

24. A classic and controversial example of pulling legal scholarship back into the so-called orbit of relevance can be found in H.T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91 Mich. L. Rev. 34, and response in R.A. Posner, "The Deprofessionalization of Legal Teaching and Scholarship" (1993) 91 Mich. L. Rev. 1921.

the temptation to impart narrow doctrinal knowledge or technical know-how was always subject to an expansionist pull from the other side.

For example, we came to accept that there were many more skills that law graduates should acquire aside from the traditional legal reasoning package.²⁵ The idea of moving from a largely “knowledge based” curriculum to a “skills based” curriculum made sense to many of us. But when we added interviewing, negotiating, counseling, drafting, advocating, fact analysis, dispute resolution and so forth, we argued and agreed, at least in theory, that the purpose should not be to just replicate conventional practices and know how, but rather we should examine the skills critically and ethically in the very process of teaching them. “Know-why” should be just as important as “know-how”, because if it was not, law schools would become trade schools, rather than a legitimate part of the university.

To take another example, when we were pressed by students and the legal profession to teach more rules in the name of producing minimally competent lawyers, we would remind ourselves that “rules are not self-creating, self-identifying, self-articulating, self-interpreting, self-applying, self-implementing or self-justifying.”²⁶ Even more compelling was the reality that the so called rules would be subject to dramatic change, so rule handling was the fundamental point, not rule memorization.

When we talk simplistically of this tension, we do not just mean that perhaps law teachers can be located on one side or the other, although that is true, but rather we mean that this tension often resides *within* each of us individually. We are not necessarily clearly on one side or the other, but rather we live in the tension. But are we now witnessing a competitive market in terms of student and professional ethos that is pulling too far in the direction of “vocational relevance”? What I find disturbing is the possibility that this discourse between us and within us is now in danger of being silenced by division. Are we in a situation where at some schools the culture and market forces we face have led us to give up the tug of war, drop or cut the rope, and conform to the narrow demands of the student and professional audience? Will the popularity of the curriculum, the privatization of funding, and the prestige of a school be measured increasingly by narrow practical relevance at the expense of the more transformative and inclusive academic mission? Is one side winning the tug of war while the other side is being marginalized, if not terminated?

25. N. Gold, K. Mackie & W. Twining, eds., *Learning Lawyers' Skills* (London: Butterworths, 1989).

26. Twining, *supra* note 22 at 175.

As we struggle to find private funds, usually from large law firms or corporations, are we developing our curriculum and culture so as to attract the approval of this segment of the profession, and avoiding discourse and scholarship that might alienate funders, because we are critics of the profession? Do we follow the money, or are we speaking the truth as we see it?

The *Canadian Lawyer*²⁷ rankings that take aim at so called unpractical policy and political discussion at law schools are an example of where the market is going. We face the pressure of an anti-intellectual vocational market culture on the student side, and the pressure of an increased anti-intellectual pragmatic business orientation on the professional side. The broader more pluralistic academic vision is in danger of being squeezed out. It may be a poor example, but I note that the ferment in our contemporary student body does not revolve around issues of justice in society, or even great debates about what we should be teaching, but rather the deepest issue for debate is whether our grading system puts the students at a disadvantage in getting jobs in comparison with the alleged grade inflation at other law schools. This is the triumph of the competitive market writ large. In addition to competing for students, law schools now are perhaps engaged in a grade inflation competition as to which school can graduate students with the highest marks.

The impact of vocational pressures as played out within the competition between law schools is not without its uncertainties and ironies. On one hand, it might be argued that the elite schools can offer the most academically oriented programs and engage in the most interesting critical scholarship, and the school's reputation will to a considerable degree be based on the scholarly work of the faculty. That the scholarship and teaching may have little impact on the career choices of the students is an irony,²⁸ but in this scenario it is the less-than-elite schools that are in greatest dangers of moving to vocationalism pure and simple as a way of attracting students and producing a marketability for them in the face of the obvious prestige that is attached to a law degree from the elite institutions. Schools at the top can sustain a scholarly approach to law because employers are less interested in what they teach than in the credentials that they offer. Lower ranked schools will comparatively be

27. Each January the magazine publishes commentary and ranks and grades law schools based on a survey of a few recent graduates as well as the opinion of a few lawyers and judges.

28. An interesting question is whether the more elite schools with a broad based curriculum really make any impact on the ideological and ultimate professional or public policy choices taken by their graduates. Do elite schools afford to have "counter-cultural and critical" professors, but in a context where virtually all of their students give no heed to what they are exposed to, but rather move in mass to lucrative and conventional corporate practice?

under greater pressure to focus the law school on vocational relevance to compete and market their students as being better prepared for practice. On the other hand, it might be argued that the elite schools are going to be elite precisely because the scholarship and program of studies is connected to the interests of the elite segments of the bar and bench. In this scenario lower ranked schools are under pressure toward greater vocational relevance simply as a means of competing with the elite schools.

II. *Cooperation*

My second theme is the movement from competition to cooperation. Obviously if there is any truth at all to the trends that we find disturbing, our concerns must be primarily addressed within each of our law schools, by way of leadership, collegial debate, action strategies, and the like. At the next level, there are potential cooperation and coordination initiatives that might be taken at the regional level. Being the only law school in a province is different than being one of six or even one of two. In over two decades of teaching law at the only law school in the province of Manitoba, my experience has been one of being completely isolated from any other school, despite whatever contacts are made through the Canadian Association of Law Teachers or whatever. Perhaps we could form some stronger links between schools in the prairie region. While local and regional action is important, I want to at least raise the question as to whether we need more collective action at the national level. Is it possible to keep disparity in check by taking some collective action? Is it possible to take cohesive action to enhance and preserve the broader mission of law schools in the face of "trade school mentality" pressures?

1. *New National Institution?*

We begin, not with how various issues might be addressed nationally, but rather with a prior institutional question. Do we need a new national organization or institution to deal with issues of legal education, or are our current organizations adequate? In this regard, our attention will immediately be drawn to our existing organizations: The Canadian Association of Law Teachers, the National Committee of Law Deans, the Canadian Law and Society Association, and the Association of Canadian Law Libraries. Given that legal education is obviously a concern to the profession and not just the professors, we also have the Federation of Law Societies and the Canadian Bar Association. Perhaps legal education at the LL.B. level might be of some concern to the judiciary and thus of interest to the Canadian Judicial Council. There are probably many more institutions that represent various legitimate interests in what law schools

are doing, including numerous national institutions involving teaching and research in the social sciences and humanities.

In terms of institutional structure, our existing organizations, however well meaning, seem to me to be inadequate in structure and resources for the task at hand.²⁹ No one institution has the power or the vitality to make a fundamental contribution to the direction of legal education in Canada. This may be a good thing, in terms of preserving the institutional autonomy of each school, but perhaps on the other hand it is a bad thing in that cooperative efforts, even voluntary ones, are difficult to achieve without a better structure of coordination.

While the Arthurs report did serve as a catalyst to stimulate a more diverse legal scholarship in Canada, it is worth reminding ourselves that back then there were also recommendations made for new national institutions and, jumping ahead to my third point, the report even recommended that standards be set in terms of legal education. For example Recommendations 14 and 15 of the Report stated:

14. Early and favourable consideration should be given to the establishment of a Canadian Centre for Studies in Legal Education that would conduct research in and coordinate cooperative efforts to develop new teaching techniques.

15. The Canadian Law Deans, in cooperation with other bodies, should work toward the development of guidelines for the assistance of law faculties, university administrators and governments. These guidelines would suggest appropriate law school faculty/student ratios and library budgets and policies.³⁰

In 1985, not long after the Arthurs Report, the Federation of Law Societies of Canada organized a major national conference on legal education which was held in Winnipeg. The conference focused on the theme of legal education as a continuum, from pre-law education, LL.B. program, bar admission and articling year, through various levels of basic CLE, specialization CLE and even remedial CLE.³¹ As a participant at this conference, the most important resolution that arose, in my opinion, was that the Federation of Law Societies and the Canadian Law Deans should jointly establish some kind of national structure for the study and coordination of legal education dealing with this continuum. After the

29. I admit that I am now in water over my head because I have never been a dean or aspired to be one, and while I have attended a fair number of C.A.L.T. meetings over the decades, I have never been actively involved in leadership in this organization. While I have been a Benchers of the Law Society of Manitoba several times in the last two decades, I have not been involved with the Federation. Thus, I admit that my remarks are impressionistic.

30. "Arthurs Report", *supra* note 16 at 156.

31. The background papers and proceedings were published. See R.J. Matas & D.J. McCawley, eds., *Legal Education in Canada* (Montreal: Federation of Law Societies of Canada, 1987).

conference, a task force, which included then Dean Trevor Anderson from Manitoba and then Dean Rod Macdonald from McGill, formulated just such a proposal to implement a national committee on legal education.³² The proposed national committee would not have any independent legislative power in the area of legal education, but it would have the mandate to work with the law schools and the various bar admission and CLE players. Initial priority items that were to be addressed by the National Committee on Legal Education included CLE coordination, education in professional ethics, increasing the resources for legal education and scholarship, and working toward better education in comparative law in terms of civil law and common law legal systems.

What happened? The Joint National Committee on Legal Education as it was called was briefly established and did some work in the area of professional ethics, commissioning a major report on this subject³³ which also led to a national conference.³⁴ But beyond this development, there is today no Joint National Committee on Legal Education as recommended by the Winnipeg Conference and the subsequent task force. There is no Centre for the Study of Legal Education as recommended by the Arthurs Committee.³⁵ The Law Deans have not developed minimum standards for anything as far as I know, unlike the Australian Law Deans who have established standards for funding and facilities.³⁶ Did these

32. "Task Force Report to the Federation of Law Societies of Canada and the Committee of Canadian Law Deans", *ibid.* at 83.

33. W.B. Cotter, *Professional Responsibility Instruction in Canada: A Coordinated Curriculum For Legal Education* (Montreal: Joint National Committee on Legal Education, 1992).

34. See "Special Issue on The Legal Profession and Ethics" (1995) 33 Alta. L. Rev. 719-943 which contains the papers for the conference held in Calgary in 1994.

35. For a brief time before the Arthurs Report was issued, a Centre for Studies in Canadian Legal Education had been established through funding from the Foundation for Legal Research in Canada. One publication resulting from this initiative was N. Gold, ed., *Essays on Legal Education* (Toronto: Butterworths, 1982).

36. The standards include the following:

- an overall staff/student ratio no higher than 1:15;
- the provision of funds to provide proper remuneration and incentives sufficient to attract and retain qualified staff;
- a recognition that a clinical and skills component in legal education necessitates a staff/student ratio no higher than 1:8;
- the provision of an adequate building and infrastructure to permit a full range of educational activities such as meeting clinical programming and small group teaching;
- the provision of both adequate support equipment including computer access for both teachers and informational retrieval, as well as adequate support staff.

This information found in E. Clark & M. Tsamenyi, "Legal Education in the Twenty-First Century: A Time of Challenge" in Birks, *supra* note 21 at c.3.

proposals die because of some perception of a loss of autonomy that might result over time by having such national initiatives? Or did the ideas die because of lack of funding or leadership?

On this issue of creating an institutional structure to take national initiatives, I wonder whether we need a new Canadian Association of Law *Schools* that merges the Law Deans and CALT and perhaps has representation from other organizations. This might then be an association of *schools*, not just a learned society of teachers *at* schools, as our current CALT is. And in terms of power, while deans would be ex-officio members, each school would vote for one or more additional representatives to the executive of the organization.³⁷

2. *New National Initiatives?*

While more could be said about the desirability or undesirability of creating a new institution, let us move on to what kinds of initiatives might be taken by such an institution, or perhaps even by existing ones. One might well be skeptical that a new national organization of some kind would achieve a sufficient consensus as to goals and have sufficient leverage as to means to be able to achieve some reversal of any trend that we find disturbing. Indeed, within our own university communities there has been a centralization of functions as university administrations develop research services, teaching services, student services, human resources, management services etc.³⁸ There is a degree of scepticism as to whether this centralization has led to more effective and efficient service, or whether instead funds have been diverted from faculties to create a further layer of bureaucracy too far removed from the actual communities found within faculties. Even within our own faculties we find it difficult to take any collective action, as we become increasingly autonomous and alienated from each other. The call to cooperate at the national level seems to be far fetched when we cannot even cooperate locally.

Nevertheless, despite this scepticism, I think it is worth considering what a national organization might achieve. In this regard I expect that with some brainstorming we might come up with a long list. I will only mention a few items that come to mind. First, given that rankings will be

37. Obviously this idea of having an association of schools is partly based on the American model of the Association of American Law Schools which does not exist simply as a learned society of legal *scholars*, but also is a formal association of *schools* with standards of membership.

38. For example, it is quite revealing to note how many tasks are assigned, not to faculties, but to various actors and institutions in the central university structure at my university. See Final Report of the Task Force on Strategic Planning, *Building on Strengths* (Winnipeg: University of Manitoba, February 1998).

done no matter what we do, that consumers of legal education will be looking at law school calendars and web pages, and that schools will go through all the puffing and bluffing associated with marketing, a national clearing house of information on legal education could be established where objective data on schools are made available in a yearly publication and on the web. We could control the process as to what factors should be looked at and even publish comparative statistics on law schools ourselves. Perhaps instead of spending more resources trying to market our own school we could actually cooperate in some way at the national level to provide information to prospective law students. Perhaps we could even work at coordinating the placement market so that the competition among various jurisdictions as to when employers interview and hire summer and articling students is reduced.

Second, while it would be nice, I hardly expect that richer schools are going to give some of their resources to poorer schools, but could we not identify shared needs and then *raise funds at the national level* for addressing those needs, rather than always going it on our own? We might formulate any number of examples of need, but let me just hint at one, namely the use of technology. Our Law Foundation in Manitoba has been wonderfully supportive in providing us with a state of the art computer lab and providing funding for upgrading it from time to time. We also have regularly gone to alumni endowment funds to build and maintain our computer infrastructure. But however important the lab and our faculty network is in terms of using it for communication and for legal research, and even though we have developed excellent web pages for the school, we have not even scratched the surface in developing electronic teaching materials and computerized tutorials, or in developing the distance education techniques available through web technology. The potential of web-enhanced teaching is powerfully illustrated by the work of John McLaren from Victoria, Wes Pue and Lyndsay Campbell from U.B.C., and Ian Holloway and Simon Bronitt at the Australian National University (in Canberra), who have collaborated to produce a wonderful web site containing interactive course materials, tutorials, exercises and conferences for students in their colonial legal history course.³⁹ Given the relatively small market in Canada, I think we need a national initiative in terms of funding and developing electronic materials and course supplements of this sort for the benefit of all schools.

39 . There is not much point in giving the web address since a password is required to access the materials. However, for a description see D. Harris *et al.*, "Community Without Propinquity"—Teaching Legal History Intercontinentally"(1999) 10 Legal Edu. Rev. 1.

With a national technology initiative, we might even open up the possibility of sharing professors and courses as between schools. Our students could take a law and economics course taught by a professor in Toronto without having that professor actually present in Winnipeg. The web course on Colonial Legal History is a prototype of sorts that could be expanded to allow any law school to contract with say John McLaren or Wes Pue and have them offer the course to our students without travelling to Winnipeg to do so. Even at the more mundane level of current electronic information, we need to develop a central web location where legal materials and articles and information for Canadian law students and scholars are developed and deposited rather than having to visit innumerable and ever changing different sites with each of us hiring a student every summer to upgrade our web links. I think we might collectively seek resources, hire expertise and recruit the professors across Canada who are interested, and then organize the development of materials and programs to utilize new technology, rather than leaving each school to compete as to computer innovations in education. This is just one example of how we might cooperate rather than compete.

Third, I notice that many schools have established student exchange programs. Since we do not have them at my school I am not aware of all the particulars, but my understanding is that a student will pay tuition to their own school while taking a semester or even a year at a foreign law school, and by reciprocity a student from the other school can spend time at your school while paying fees to their home school. If this seems like a good idea for students, it must be a good idea for professors even within our own schools in Canada. We could establish a professor exchange program among Canadian law schools, which would *not* be a sabbatical program. Rather the professor would be paid fully by their own school, say Manitoba, and agree to move to New Brunswick for a year to teach, while a professor in New Brunswick would agree to move to Manitoba for the year. Perhaps funding for moving expenses might be found nationally to run such an exchange program; perhaps in some cases costs would be minimal as professors could exchange houses, offices, and vehicles. There is nothing new here, and no doubt some schools are more geographically attractive as candidates, but a simple initiative such as this might lead to a greater sharing of resources and developing links that hold us together.

Fourth, there may be other ways that resources and programs could be shared. Why not have a summer term program abroad (or rotating among Canadian law school locations) that is sponsored by all Canadian schools collectively, with teachers from a variety of schools and open to all students from Canadian law schools? Why not offer various concentrated

specialized educational terms on a similar bases but organized as a collective Canadian law school enterprise?

III. *Accreditation?*

1. *Why Should We Look At Accreditation?*

There might be a variety of other collective initiatives that we could propose connected to enhancing legal scholarship and teaching within the broader scholarly mission of law schools. However one issue is whether it would be beneficial to establish, through an Association of Canadian Law Schools, various national minimum standards for Canadian law schools? Before we look at the current scheme of accreditation in Canada, or more properly the absence of one, and compare our situation with the American model, a few points might be outlined as to why this topic is even being proposed for consideration.

The first reason is that accreditation may provide an avenue for poorer schools to increase their resources. Poorer schools currently have less financial support within the public allocation of funding to universities as compared with other schools, and they also are unable to get the multi-millions that law firms are willing to give to the top elite schools. Moreover they are less likely to have any control over the amount or allocation of tuition fees.⁴⁰ Accreditation standards that include resource based minimums might help to moderate the growing gap between the richer schools and the poorer ones. There is no doubt that when you have suffered through prolonged resource starvation the first impulse is to think about potential accreditation as a way of extracting more money for your enterprise. Presumably if you are a professional faculty and you are under threat of losing your accreditation because you are falling below the standards in terms of the numbers of faculty needed for the program, or the adequacy of the library and so forth, you can use the threat to get more money from the university (or the university can get more money from the government) or you can get more money from the alumni or student consumers, presuming that the threat of losing accreditation is real and that the university or government or your alumni actually care whether or not the law school survives.

40. As I understand it, some Ontario law schools have been given the right to set their own tuition fees and retain the increased amounts of funds so raised to the benefit of the school. As to private funding, see for example the announcement that three Toronto law firms each donated one million dollars to U. of T. Law School: "And Now a Word From Our Sponsor" (1998) 2 Can. Law School Gazette 1.

On the issue of resource-based standards, it is important to note a difference between the American scene and the Canadian, in that many law schools in the United States are attached to private universities, while all Canadian schools are attached to public ones. In the United States, law schools have historically been “cash cows” for the university, in the sense that the tuition that can be generated by law schools is greater than the actual cost to the university and there is a continuing pressure for law schools to use the accreditation process as a shield against the university taking money from the law school to support less well endowed but valid areas of scholarship like music or history for example. One commentator noted that George Washington University diverts 40% of law school tuition for other programs, while most universities typically divert only 18 to 25%.⁴¹ That is notable when you consider that usually in Canada the issue is not keeping resources generated by the law school within the law school, but rather trying to extract resources from the central university pot. Even though tuition is differentially rising for our law school in comparison to other faculties, and is diverted to the university because we get no differential benefit from our higher tuition, nevertheless only a portion of the real cost of university education in Canada is from tuition. Our tuition fees now amount to almost 50% of our operating budget (not including building “rental” and maintenance and so forth). This is the highest it has ever been, given the rise in tuition fees and the decade long yearly slash in the operating budget. But the point is that the majority of funds for legal education still comes, not from tuition, but from the public purse to the university by way of government grants.

The superficial attraction of accreditation in Canada is that it might be used not as a shield, but as a sword to leverage more funding from the university for the law program. This would likely be at the expense of other programs that do not have the accreditation sword to swing and therefore raises some profound ethical questions. Do we have any more right to greater resources than the music department? I think not, but what is annoying is that other professional schools do have an accreditation process and when a professional school is in danger of losing accreditation because of lack of resources, the university has historically allocated resources so as to retain accreditation. Accreditation, based on resource standards, may be justified as a measure of ensuring minimum quality, but it can also be criticized as a cartel that impacts negatively on the wellbeing of competing interests that do not have their own cartel to exercise collective power over the resource allocation. On the other hand, if the increased resources come in by way of higher tuition fees for law

41. P.E. Ponce, “Critical Accreditation Review” *Legal Times* (17 October 1994) 4.

students and private funding initiatives from the profession, rather than at the expense of other academic units that have less power in the economic market, there are still ethical issues, as these costs are eventually absorbed by the consumers of legal services. Without resolving the ethical question at this point, I am nevertheless suggesting that the issue of national accreditation is important for us to consider because it may be perceived as a necessary way for poorer schools to get adequate resources for legal education.

A second reason to consider accreditation relates to other benefits of regulation aside from resources. In theory, having standards and following them might reduce some forms of competitive behaviour thought undesirable. For example, while it would be very difficult indeed to get national standards for curriculum, and dangerous to institutional autonomy and innovation, it might be possible to have broad academic standards that mandate and preserve the mission of the law school to research and teach "the foundations and frontiers of law"⁴² rather than reducing legal education to only that which is perceived as instrumental for the training of lawyers. Likewise, if you have admissions standards that require a degree of diversity based on factors beyond academic index scores, presuming that the standards are followed, no single school can take students exclusively based on the highest academic scores.

The third reason that might make us look at a national accreditation scheme is the announcement from the British Columbia Law Society that, starting in 2001, students must pass a bar entrance examination as to their knowledge in a number of areas of law (ten subjects are contemplated) *before* they are allowed to take the Professional Legal Training Course.⁴³ The idea that the profession will have an entrance examination *before* the phase of education that the profession itself is responsible for, as opposed to having a bar exam at the *end* of that phase, is a disturbing development in my view.

It was not that long ago that legal education at the LL.B. level escaped from the direct control of the profession and gravitated into the orbit of the academy. But the gravitational force of the profession over the content and direction of legal education has always continued. The influence of the profession is not just the potential power to recognize or refuse our degree or mandate parts of the curriculum in an accreditation process that

42. See Arthurs, *supra* note 15 at 21.

43. "Credentials Committee moves forward on PLTC entrance exam" *Law Society of British Columbia Benchers' Bulletin*, March-April, 1999. I note that after a stormy consultation forum held in Vancouver on 17 September 1999, the proposal is now being delayed till the graduation class of 2002.

the profession sets up for us. Rather, without any direct interference with our autonomy, the reality is that the bar admission courses and standards of the profession's own entry education have always exerted a pressure on student choices within the LL.B. program and also have influenced our own mission in terms of the practice and academic tension we live in. We know that even without a current shopping list of courses required by the profession as an entry standard students often make course selections based on their perceptions or misperceptions as to what courses are seen as practical by employers and essential or at least very helpful to them as a matter of passing bar examinations. It is at least arguable that these selections may be short-sighted and that courses and materials provided in the bar admission process are, or should be, quite adequate for purposes of passing these exams. Yet students may be wasting a golden opportunity by forgoing public policy and theory and interdisciplinary courses to take more black letter stuff instead. If this is now the case, it is obvious that the British Columbia announcement will affect student choices in law school like never before. Indeed the announcement recognizes this by suggesting a shopping list of subject areas that will be covered by the proposed entrance exam and also giving some lead time for students "to adjust their curriculum and course selection."⁴⁴

One can certainly understand how law societies have a difficult time with the reality that the portability of law degrees translates into a wide diversity of propositional knowledge and skills training. A doctrinally oriented common examination at the beginning may make sense in terms of clearing the decks for the skills-based training to follow. But central to the skills-based approach itself is the concept of student centered learning and more importantly the skill of life-long self-learning. If one ultimate skill is the ability to take areas of the law and learn them on your own in terms of propositions and processes, why in the world would you try to get students to modify their course selections in law schools to some kind of core now required for your entrance bar examination? Why would you not emphasize instead the value of the materials you will provide to students for purposes of self-study? In any event, the movement of the profession to test students on substantive and procedural doctrine right after law school obviously feeds into the existing pressure to marginalize the more theoretical and contextual and interdisciplinary teaching of law. In essence, while the law society has the power to set whatever standards it wants as a self-governing body controlling entry, the law schools would

44. Anticipated areas include: commercial law, company law, criminal procedure, family law, real estate law, wills and estates law, civil litigation, administrative law, ethics/professional responsibility (integrated aspects), and tax law (integrated aspects), *ibid.*

be in a better position to preserve their autonomy and resist undesirable standards contemplated by the profession if they collectively set their own national standards of accreditation, or joined with the profession at the national level and coordinated the process. What British Columbia has done may well affect every law school in the country in terms of creating a kind of core curriculum as set by the profession, not the law schools.

The fourth reason why accreditation might be relevant to us all, is that there may well be some new law schools established in Canada. There have been no new schools for two decades so the question of accreditation has died away.⁴⁵ As will be outlined briefly below, currently all the law schools have been accredited in an ad hoc process by each provincial law society, and once so accredited there is no process by the profession to review the accreditation of schools. As long as no new schools are established, the issue of accreditation by the profession or by the law schools collectively dies away. But it is possible that a new law school with particular emphasis on aboriginal students and aboriginal legal issues and perspectives might arise, perhaps in the newly formed territory of Nunavut.⁴⁶ There is also the possibility, perhaps remote but not out of the question, that the next law school that will arise in Canada will not be a law school at a public university. Tuition fees are now rising at some schools to the point that the funds could easily support the establishment of private law schools. Furthermore, and even more controversially, the next law school may arise within the context of a religious faith based university.

Suppose for example that the evangelical Trinity Western University in British Columbia attempts to organize a Christian law school in Canada as a professional school and seeks both governmental authority to grant an LL.B. degree and accreditation from the Canadian law societies to have the program accepted for entry into the profession. Such a school would not arise because there is a market demand for new law schools and more lawyers in an aggregate sense. Rather the issue is the pervasive role that law plays in society and the power that graduates of law have in the overall structuring of our life in public community and also increasingly within private communities. If law is essentially what lawyers and judges say it is, then it matters a whole lot what the

45. The most recent common law school to be established was Moncton in 1978 where the common law program is taught in the French language.

46. For background information on the Territory of Nunavut, see <<http://www.nunavut.com>> (date accessed: 18 July 2000). Most recently it has been announced that the Faculty of Law at the University of Victoria will create a special program for the education of Nunavut law students.

ideological currents are from which this law emerges, and what the dominant ideology is within which law is studied, and ultimately what the dominant ideology of the profession will be.

I used to think that this idea of a religious faith based school in Canada was totally improbable, but I now think it is possible. The fact of the matter is that in Canada we already have a core of evangelical Christian law professors teaching at various law schools or recently retired from them (and still willing to teach) and numerous lawyers with evangelical Christian connections and post-graduate credentials to staff the school. We also have a considerable pool of potential students and donors, and the academic infrastructures within which a school could be started. We have a large degree of political alienation within traditional Christian communities that can fuel a drive to separate from secular institutions which claim to be pluralistic but in reality silence faith based voices. The intellectual leadership of the community is hardly united behind a kind of return to Christendom ideology in the public square, but rather many, if not most, evangelical Christian academics are pluralistic liberals, but ones who believe liberalism itself can only be coherently practiced when rooted in some ultimate moral norms that transcend cultural contingency and post-modern secular relativism.

My point is not to debate the pros and cons of having a faith based law school, but rather to suggest that there would be a hornets' nest of controversy over the opening of such a school. There is a rich literature on the tradition and accreditation of faith based law schools in the United States, particularly in regard to the controversy over accreditation standards prohibiting discrimination in student selection and faculty hiring, and the professional accreditation of Trinity Western education graduates is also the subject of litigation in Canada.⁴⁷

47. As to balancing religious group rights of exclusivist membership and lifestyle norms with individual rights based on inclusivist premises, see A.J. Esau, "Islands of Exclusivity: Religious Organizations and Employment Discrimination" (2000) 33 U.B.C. L. Rev. 719. More particularly in the law school context see "Symposium on Religiously Affiliated Law Schools" (1998-99) 11 Regent U. L. Rev. 1-69; "Symposium on Religiously Affiliated Law Schools" (1995) 78 Marq. L. Rev. 247. See also "Commemoration" (1994) 69 Notre Dame L. Rev. 995; "Symposium on Accreditation of Church-Related Law Schools" (1982) 32 J. Legal Edu. 159; T.L. Shaffer, "Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools" (1993) 45 Stan. L. Rev. 1859; R.J. Aroujo, "Legal Education and Jesuit Universities: Mission and Ministry of the Society of Jesus?" (1991) 37 Loyola L. Rev. 245; L.J. Nelson, "Religious Discrimination, Christian Mission, and Legal Education: The Implications of the Oral Roberts University Accreditation Controversy" (1985) 15 Cumberland L. Rev. 663. As to the education graduates of Trinity Western, See *Trinity Western University v. B.C. College of Teachers* (1998), 169 D.L.R. (4th) 234 (B.C.C.A.); (1997) 41 B.C.L.R. (3d) 158 (B.C.S.C.). This case is currently before the Supreme Court of Canada.

The issue of accreditation of new schools might be better addressed collectively at the national level rather than having some new school go from jurisdiction to jurisdiction seeking accreditation. Particularly when you might have a new school based on a different vision than the mainstream one, it is entirely possible that one jurisdiction might be politically sympathetic to such a school and give it accreditation while another would be hostile and refuse recognition. In my view a start-up school would be better off to know up front what the requirements are that would have to be met for it to be both faith based, aboriginal based, private, or whatever and yet be academically and professionally sound in terms of program. The consequences of having no such national standards for accreditation might be the end of portability of law degrees and a greater amount of controversy.

A fifth reason to be considered is the potential influence of developments in England, where in the name of public accountability governments have legislated performance evaluation schemes and have then funded university departments based to a significant degree on the rank that they achieve after having their scholarship assessed through outside peer review.⁴⁸ The next step in England is to measure teaching quality as well as scholarship for purposes of funding.⁴⁹ Government funding by way of ranking of quality is not something that I presume we would be interested in replicating in Canada, but perhaps it is on the horizon. If the law schools as part of the university are going to be under increased pressure by the government to be evaluated by an outside body, it makes sense to do our own standard setting and set up our own accountability structures so that the dangers of a more intrusive process are either avoided or at least more adequately prepared for.

If I am correct that there are various reasons why the issue of law school accreditation should be on the agenda again, there are of course a host of countervailing forces that immediately make every law dean groan at the prospect. The possibility of some loss of institutional autonomy, the prospect that standards might kill innovation and create standardization, the expense, both financial and human, of setting up and running an accreditation scheme, and the possibility that standards used by poorer schools as a bargaining tool might be used *against* richer schools to reduce current levels of resources, all come to mind. In addition, rather

48. I am indebted to Prof. Toni Williams from Osgoode who explained the English system to me. For a sympathetic treatment see J.W. Barnard, "Reflections on Britain's Research Assessment Exercise" (1998) 48 J. Legal Edu. 467.

49. See A. Bradney, "The Quality of Teaching Quality Assessment in English Law Schools" (1996) 30 Law Teacher 150.

than helping poorer schools, the existence of standards, even voluntary ones, that for whatever reason cannot be attained, may actually lead to the demise of some schools rather than their regeneration. Nevertheless, we will proceed to survey in a comparative way the current situation in Canada and that of the United States.

2. The Current Ad Hoc Accreditation of Law Schools and the Portability of Law Degrees in Canada

The accreditation of a law school might take place at various levels, depending on the acceptability of a law school to different associations. The school might be accredited by academic agencies, as meeting the requirements set by an academic institution or association. The law school might also be “accredited” by the government, in that the school is granted the power in the first place to set up a course of instruction leading to the LL.B. However, most discussions of accreditation of law schools in Canada have focused on the accreditation given by the profession. Will the graduates of a particular law school be accepted by the profession in each province as having the requisite education to enter into articles and the bar examination course so as to be called as lawyers? One of the issues we need to consider is whether the law schools as academic institutions should set up their own accreditation scheme as an alternative to whatever scheme the profession has in place? Assuming that accreditation from an academic point of view is desirable, another issue is whether the academic accreditation should become the professional accreditation standard as well, or whether the two processes should be separate. Another option is to have one process where both academic and professional concerns are represented.

The current system of accreditation by the profession in Canada is ad hoc and unstable. In 1985, Lyman Robinson, then Dean of the University of Victoria Law School, did a comparative survey on the topic of accreditation of law schools and the portability of law degrees in Canada, England, the United States, New Zealand and Australia for the Conference on Legal Education held in Winnipeg.⁵⁰ He suggested that accreditation as a matter of professional recognition of law schools was primarily based on resource standards in the United States, as compared with curriculum standards in Canada. As outlined by Robinson, it appears that in regard to common law schools in Canada, accreditation by the profession was influenced by the Ontario compromise of 1957 arising out of the struggle between Osgoode Hall, which was then a professionally

50. L.R. Robinson, “Accreditation of Law Degree Programs” in Matas & McCawley, *supra* note 31 at 791.

controlled trade law school, and the university law schools, particularly the law department at the University of Toronto.⁵¹ The Law Society of Upper Canada finally came to the point of recognizing the university based LL.B. degree, but only if the law schools taught a shopping list of 23 “core” subjects to every student.⁵² As law schools sought more autonomy and innovated with curriculum, they negotiated with the Society, and this shopping list was eventually reduced in 1969 to seven courses. In most law schools, the “super seven” (real and personal property, contracts, torts, criminal law, civil procedure and constitutional law) are taught in the mandatory first year curriculum. It seems that Ontario set the standard for accreditation, as other jurisdictions followed the Ontario model for granting accreditation of new schools, or in any event schools would have to conform to the Ontario model anyway so that their graduates could enter into practice in that province.⁵³

Thus the idea of having a short list of required courses in the curriculum so as to be accredited by the profession appears to have been the process used for the accreditation at one time or another of all of the 16 current common law faculties of law in Canada. There may have been other factors that various law societies looked at as well, but no coherent list of factors, aside from the list of courses, appears to have been formulated.⁵⁴ As noted, the Law Society of British Columbia’s new

51. See C.I. Kyer & J.E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers and Legal Education in Ontario 1923-1957* (Toronto: Osgoode Society, 1987). Also see C. Moore, *The Law Society of Upper Canada and Ontario’s Lawyers 1797-1997* (Toronto: University of Toronto Press, 1997).

52. An interesting historical account of the Ontario situation is provided in a memo from Kenneth Jarvis, then Secretary of the Law Society of Upper Canada, to David Jenkins, then President of the Federation of Law Societies, attached as Appendix 1 to Robinson, *supra* note 50 at 821-26.

53. The actual wording of the Law Society of Upper Canada regulations for approval of law schools in both 1957 and as changed in 1969 can be found in the *Report of the Special Committee on Legal Education* (Toronto: Law Society of Upper Canada, 1972) at Appendix D. This report is commonly referred to as the MacKinnon Report and was famous for its recommendation to abolish articles. It is interesting to note that while the focus is on core courses, the 1957 agreement required students to have two years of university before entering law school; required law schools to have a three year LL.B. program and to have a minimum of five full-time professors and a library of at least 10,000 volumes. That none of these standards appear to have been upgraded from time to time supports my position below that the profession has largely retreated from the field of law school regulation.

54. The shopping list of courses approach has been used in England as well, where there has been a list of six so called core courses that students must take in law school if their degree is going to be recognized so as to enable them to be waived through to the vocational stage of legal education. See Twining, *supra* note 22 at 162-66. Some jurisdictions in Australia have the so-called “Pearce 12” list of required courses based on the recommendations of the 1987 “Pearce Report on Legal Education”. See Clark & Tsamenyi, *supra* note 36 at 17.

entrance examination proposal might indirectly create another shopping list of required upper year courses in addition to the old core of seven historically required by the Law Society of Upper Canada.

While it is difficult to conceive of a law program that would not expose the students to the “super seven”, the idea of having a mandatory curriculum of core courses as set by the profession for purposes of law degree recognition is problematic. Why would a course on Professional Ethics not be on the list? Why would skills oriented courses not be on the list? Why is Jurisprudence not on the list? Furthermore, defining a list of mandatory core courses does not get at the basic quality of a law school in terms of resources, good instruction or adequate research output. Aside from the obvious limitations of basing accreditation on courses of instruction, as if the study of law was a doctrinal meal with some core dishes on the menu and everything else being optional appetizers or desserts, it is even doubtful that the core courses approach has survived. If a new common law school started up and sought accreditation from each provincial law society, would there still be this list of mandatory courses that needed to be in the curriculum? Viewed another way, if a school radically changed its curriculum so that arguments could be made that it did not teach some of the old core, would anybody take notice?

For example, it was recently discovered by our dean that two faculty members who taught a particular first year course were going to be on leave next year. The suggestion was then made that we would not teach the course that year. We would just drop it from the curriculum. Now my point is not to debate whether this is a good idea or not, and indeed the course is not one on the old core list anyway, but it raises the question as to whether we have such autonomy from professional accreditation that *once we have been accredited* we can do pretty much as we want. Aside from the indirect pressure of the bar admission course on student selections of law school courses, the accreditation of our schools by the profession is not a factor that arises in our minds on any continuous basis as it does in the United States, where schools every seven years must go through a process of retaining accreditation. If a new law school starts in Canada it must go through a process of having its program accredited by each of the various provincial law societies. But once that accreditation is gained, there appears to be no process of reviewing it or losing it. We might be happy with this in terms of our autonomy, but on the other hand, we may conclude that Canada currently has no formal process or standards for law school accreditation at all, either at the provincial and territorial levels of the profession or at the national level, and thus the benefits that we might gain from having an accreditation scheme are lost.

No attempt is made here to formally survey each law society to see what the current accreditation standards of that society would be if a new law school started. Each governing body can potentially set its own standards, but the point I want to make is that arguably the Ontario “super seven” curriculum model is not necessarily the *de facto* standard any longer. I note for example that Rule 85 of the Law Society of Manitoba reads as follows:

85 An applicant may be admitted to the bar admission course as an articling student

(a) if he or she is a graduate of the Faculty of Law of the University of Manitoba or a law course in Canada approved by the committee [referring to the Admission and Education Committee of the Law Society]. . . .⁵⁵

While the University of Manitoba is mentioned as if privileged in some way by the local bar, the effect of the rule is that anybody who graduates from a Canadian common law school can article in Manitoba because in the past all current 16 common law schools were approved by the Law Society of Manitoba. No list of requirements is published as to what the standards would be for the approval of a new law course. While the power seems to be open for the Law Society of Manitoba to review such approvals once given, it is my experience as a Benchers that there is no willingness to do so. Furthermore, so long as the rule is in place, we could arguably do anything at the University of Manitoba and our graduates would at least have the right to enter into the profession in Manitoba.

The Law Society Rules in British Columbia include the provision that applicants who want to take the bar admission program must prove that

(i) the applicant has successfully completed the requirements for a bachelor of laws degree from a common law faculty of law in a Canadian university. . . .⁵⁶

The rule as currently formulated in British Columbia has no shopping list of core subjects, nor is there even a residual power recognized to review any LL.B. program, so long as it is “in a Canadian university.” As worded, if a new LL.B. program were established at a university in Canada, even a private one, the graduate would arguably be entitled to enter the B.C. program.

55. “Rules of the Law Society of Manitoba”, in *Handbook of Professional Conduct*, looseleaf (Winnipeg: L.S.M., periodically updated binder).

56. s. 311 (1) “Enrolment in the Admission Program”, Law Society Rules, in G. Turriff, *Annotated British Columbia Legal Profession Act* (Vancouver: Western Legal Publications, 1998).

Most jurisdictions in Canada simply require that to become an articling student you must have an LL.B. degree from a Canadian university law school, but no additional formal rules have been passed for the recognition of such law schools.⁵⁷ Aside from Ontario, assuming the 1957 and 1969 regulations are still on the books, only Newfoundland has an explicit shopping list of required LL.B. courses.⁵⁸

Aside from the issue of what, if any, standards should be used by the profession to recognize the LL.B. degree from a Canadian law school, there are also the problems that could arise if a jurisdiction required an additional standard of an applicant beyond the recognition of the law school graduated from. For example a law society might grant accreditation to a law school on the basis of one set of standards, but then for purposes of admitting students the society might add some additional standard beyond having an LL.B. degree from an accredited school. For the sake of argument, the law society might, for example, require all

57. As indicated in the survey by M.P. Towler, *Articling in Canada: A Survival Guide 1996* (Toronto: Carswell, 1995).

58. "Law Society Rules of Newfoundland" as found in The Osgoode Hall Law School Articling Office & D. Romano, *The Law Students' Guide to Articling and Summer Positions in Canada*, 2d. ed. (Toronto: Emond Montgomery, 1997) at 12-13. The Newfoundland situation is presented as follows:

Rule 6.03(3)

An applicant for admission as a student shall, unless the Education Committee otherwise determines upon special circumstances, have included in his or her program of studies as a law student the major basic courses in the following subject areas:

(Mandatory)

- i) Canadian Constitutional Law
- ii) Civil Procedure
- iii) Contracts
- iv) Criminal Law and Procedure
- v) Personal Property
- vi) Real Property
- vii) Torts.

Rule 6.04(4)

The Education Committee may refuse admission as a student to any applicant who has not included in his or her program of studies any one or more courses in the following subject areas:

(Recommended)

- i) Commercial Law
- ii) Corporation Law
- iii) Evidence
- iv) Family Law
- v) Wills
- vi) Trusts
- vii) Admiralty

Towler, *supra* note 57 at 20 states that in Newfoundland if you have not had some recommended course in law school you may have to do extra study.

applicants to have taken a Legal Ethics course in law school, or perhaps the society could (subject to legal challenge) require that all applicants must have achieved at least a B standing in law school. In effect the Newfoundland approach of requiring students to have taken various courses in addition to the "super seven" is an example of applying additional standards beyond the recognition of the law school graduated from. Any additional requirements beyond graduating from an accredited law school impairs the portability of the law degree within Canada.

The portability of law degrees within Canada has many advantages, as significant numbers of students can accept a position at a law school out of their home province, even if they intend to return to their home province to practice. There are also a significant number of students who may go to law school in their home province and then get articles in another. Both law schools and the legal profession benefit from a degree of pluralism of experience that comes from portability, as opposed to having an academy and a profession that is overwhelming composed of persons exposed to the local culture of the province in question. Those schools that are elite in terms of prestige will consider themselves as being national law schools and they will draw students from every province. Indeed a majority of students at such elite schools may well be out of province. Within the context of the globalization of the legal profession and legal education, there is also the issue of the portability of law degrees as to the standards for our graduates to enter the practice of law in other jurisdictions, and reciprocally what our standards are for accepting into the profession persons with law degrees from foreign law schools.⁵⁹

Because of the ad hoc process of certifying new law schools, the lack of any process of review, and the periodic setting of individual standards for applicants in addition to the recognized law degree, Lyman Robinson surveyed both law school deans and provincial law societies in 1984 and found that there was near unanimous support for some kind of national accreditation agency, probably set up jointly by the Federation of Law Societies and C.A.L.T.⁶⁰ Under such a scheme, one common set of criteria would apply and thus graduates from an accredited common law school could enter into articles in any common law province without additional requirements being placed on them. That no such program was

59. The Federation of Law Societies and the Council of Canadian Law Deans have set up a Joint Committee on Foreign Degree Accreditation. Based on my experience of having some students over the years at the law school who have degrees from American law schools, it appears that the Committee has required these students to take another year of courses at a Canadian law school before they are allowed into the Articling and Bar Ad course in Manitoba.

60. Robinson, *supra* note 50.

ever set up is probably the result of our not having any new law schools, and in any event we have achieved the portability of law degrees because law societies for the most part simply recognize reciprocally the graduates of all hitherto approved law schools. As mentioned, this benign neglect of the issue is a luxury we no longer can afford.

The ad hoc process of accreditation by the profession could be reformed by creating a national institution with national standards. But what is also clear is that there does not appear to have been any Canadian experience or commentary on the desirability of law schools as academic institutions setting up their own accreditation systems, where the focus would go beyond the preparation of people to enter practice. Given the ad hoc nature of the profession's own process, it seems to me that the law schools have a golden opportunity to formulate a national accreditation scheme that is sensitive to the broader mission of the law schools, and then, having done so, the profession might be invited to use the law school scheme as the *de facto* professional accreditation scheme. Any accreditation process that is used solely for purposes of professional credentials will likely end up being weighted on the side of setting standards for professional competence, rather than on the side of producing scholarship or creating conditions for scholarly excellence. At least this is the conclusion that can be made after surveying the American experience as a possible model.

3. *The Accreditation of Law Schools in the United States*

The fundamental point that confronts us when looking at the accreditation of American law schools is that there are two major schemes, one by the American Association of Law Schools and one by the Council of the Section of Legal Education and Admission to the Bar of the American Bar Association.⁶¹ Historically both schemes have often covered the same territory with similar standards, and the two processes have worked in tandem, where even the periodic site visitations have been organized in such a way that both accrediting bodies can cooperate in the information gathering process. However, recently, as will be surveyed below, there have been some substantial limitations placed on the ABA scheme. That there are two separate accreditation processes rather than a single unified one will perhaps turn out in the end to be a blessing rather than a waste of resources. As the ABA scheme, in the face of anti-cartel forces, narrows the scope of accreditation and modifies the substance of law school regulation to the minimum standards thought necessary for the

61. For the ABA scheme see <<http://www.abanet.org/legaled>> and for the AALS scheme see <<http://www.aals.org>>.

education of competent prospective lawyers, the AALS scheme may take on greater importance in terms of preserving standards that foster scholarly excellence.

The two schemes differ in their power to create a monopoly. The AALS standards are "voluntary" while the ABA standards border on being mandatory. By "voluntary" we mean that no law school is compelled for its existence to join the American Association of Law Schools. It is a voluntary academic organization and schools that join agree to abide by the membership standards of the Association and undergo the accreditation process of the Association. But a law school might choose not to be a member. Currently 162 law schools are members of the AALS.⁶² In contrast, by "mandatory" we mean that every law school must conform to the ABA standards to be accredited by the ABA, because if the law school does not, its graduates cannot apply to write the bar examination in the vast majority of states. Less than a handful of states, California being one of them, allow graduates of law programs that have not been accredited by the ABA to write the bar examination.⁶³ Thus even the ABA scheme has not achieved a total monopoly over accreditation of legal education in every part of the country, although it has almost done so. Currently there are 182 law schools that are ABA accredited. Thus there are only about 20 ABA accredited schools that are not also accredited by the AALS. In those few states that allow alternative legal education through institutions not accredited by the ABA there are, according to one count, about 40 programs not accredited by the ABA.⁶⁴ Given that it is the ABA process that has been used in most states as the gatekeeper standard for the profession, and given that the ABA process has been the primary focus in standard setting, we will survey that process first.

62. AALS, *1998 Handbook* (Washington: AALS, 1999) [hereinafter *Handbook*]. Also available at <<http://www.aals.org/>>.

63. For a survey of the requirements of each State, see American Bar Association Section of Legal Education and Admission to the Bar and National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 1996-97* (Chicago: American Bar Association 1998).

64. R.L. Morgan & K. Snyder, eds., *Official American Bar Association Guide to Approved Law Schools, 2000 Edition* (New York: Macmillan, 1999) c. 13 "Unapproved Law Schools".

a. ABA Accreditation

Supposedly to improve the standards of legal education in the United States and to improve the reputation of the profession in the face of a wide assortment of schools of radically disparate quality, the ABA set standards for accreditation of schools and started to publish the list of conforming schools in 1921.⁶⁵ Eventually, after considerable lobbying from the ABA itself, every state governing body accepted the existing ABA process as setting the minimum standards for legal education, and almost every state made those standards the exclusive ones.⁶⁶ One interpretation of the history of accreditation, of course, is that elite lawyers and elite law schools gained market control to advance their own economic interests, and in some cases may have been motivated by outright racist reasons in attempting to suppress and eventually eliminate almost all of the proprietary law schools that served the needs of aspiring law students from less than elite backgrounds. Indeed virtually open admission standards to the bar existed in most of the states in the first three decades of the century, until the new rules requiring a law degree from an ABA approved school took effect.⁶⁷ Between 1930 and 1949 alone, 71 law schools closed; 69 of them were unaccredited.⁶⁸

While there is probably less demand to join the legal profession as a career choice today compared with the past, the argument can still be made that limiting the number of places for legal education in effect reduces the numbers of lawyers available to serve the legal needs of the public and drives up the cost of the services that existing lawyers charge. Requiring high standards for legal education also drives up tuition fees, because law schools that are primarily night schools, with part-time programs and part-time law teachers making a legal education available to poorer people, especially minorities, will not be certified because they do not meet the standards of accreditation.⁶⁹ This means that the setting and enforcement of standards for law schools is a process very much like a monopoly, or an anti-competitive cartel, where licensing displaces an open market.

65. A brief history of ABA accreditation is found in J.P. White, "The American Bar Association Law School Approval Process: A Century Plus of Public Service" (1995) 30 Wake Forest L. Rev. 283.

66. An overview of the process and justifications are given in "The American Bar Association's Role in the Law School Accreditation Process" (1997) online: ABA Section of Legal Education and Admissions to the Bar <<http://www.abanet.org/legaled/accreditation/abarole.html>> (date accessed: 16 June 2000).

67. See R.L. Abel, *American Lawyers* (New York: Oxford University Press, 1989).

68. *Ibid.* at 55.

69. For example the John Marshall Law School in Atlanta was refused accreditation by the ABA. See S. Ursery & J.D. Bell, "ABA Panel's Accreditation Report Threatens Atlanta's John Marshall" *National Law Journal* (17 May 1999) A20.

Obviously a national program of accreditation of law schools has arisen in the United States as compared with the ad hoc process of accreditation in Canada, because not only are there far more law schools being established from time to time in the United States, there are also many more jurisdictions to worry about in terms of accreditation and portability. A law school is better off dealing with one central authority than 50 separate ones. Each state is better off in looking to one national central authority rather than having to sort out and test applications from hundreds of schools from one end of the country to the other.

Certainly it makes some sense to have one set of standards, but it could be argued that no standards should exist at all. Let the market sort it out. Let a thousand flowers bloom. If you are particularly anti-monopolistic and criticize the cartel forces exerted by self-governing professions, you could coherently argue that a profession should identify the skills and knowledge and attitudes required for a license and then set up entry tests where anyone should be able to demonstrate that they do or do not meet the standards. Education to meet the standards could be provided by anybody in an unregulated market, but what counts at the end of the day is whether the tests for admission are passed, rather than by what route the competence of the applicant was achieved.⁷⁰ What counts is competence, not how you got it. But the pure rationality of such a model has never appealed to members of the profession. In addition to the question of whether such tests can actually be devised, resistance to open market testing is less a matter of self-interested market control, than one of professional culture. Romance rather than pure rationality means that many still believe that professions are, or should be, imbued with a spirit of public service or a calling akin to a religious vocation that requires formally structured education and acculturation, and that professional entry cannot be tested by some performance hurdle that any individual can try to jump over, although there are such hurdles to be sure. Rather education and entry is more of a path that must be taken, a road that must be traveled or a cultural experience, and in a group with mentors and tour guides.

As to the ABA process of accreditation of law schools and the fairly comprehensive standards involved, I will attempt only the briefest of overviews, particularly given the fact that, as I will outline below, the standards and procedures have undergone considerable change in recent

70. On the rationality of this model see H. Dick, "Paradigm Lost: A Summary of the Manitoba Law Reform Commission's *Regulating Professions and Occupations*" (1996) 24 Man. L.J. 263, and in the same volume see W. W. Pue, "Foxes, Henhouses, Unfathomable Mysteries, and the Sufferance of the People: A Review of *Regulating Professions and Occupations*" (1996) 24 Man. L.J. 283.

times. There are two primary documents, one containing the Standards for Approval of Law Schools and the second containing the Rules of Procedure for Approval of Law Schools.⁷¹

As to the process, new law schools can apply for provisional accreditation so that the first graduates of a school can write the bar exams, but after a period of time the school must apply for full approval. Once fully accredited, law schools must be re-accredited every seventh year, and schools can lose accreditation by no longer abiding by the standards. The process of accreditation to determine whether the standards are met involves various combinations of self-studies, yearly reports, three-day site evaluations by teams of outside evaluators, reports based on the evaluation, recommendations by the Accreditation Committee of the Council, so called Action Letters sent for non-compliance, determinations by the full Council, and appeals to the Council and to the ABA House of Delegates.⁷²

While the entire process of accreditation by the ABA Section of Legal Education and Admissions to the Bar is in essence a scheme by the profession to set quality standards for entry, at least until quite recently the process has been dominated by the professors as opposed to the profession. In 1995 the Accreditation Committee consisted of 19 members, only three of whom were practitioners, two of whom were judges, and two of whom were lay persons, while all the others were law teachers, librarians, or deans within law schools. The Council of the ABA Section and the site evaluation teams were similarly dominated by legal educators.⁷³

Given all the information that must be continually generated as a matter of accreditation, the ABA Section of Legal Education has become a central clearing house of information on law schools, although the Section does not rank schools. The Section now publishes a yearly comprehensive guide to law schools available in most trade book stores.⁷⁴

71. These documents are published yearly by the Section in a volume which also contains various documents containing rules as to the accreditation of law studies taken for credit in foreign countries, and a statement on ethical practices in the accreditation process. See Section of Legal Education and Admission to the Bar, *Standards for Approval of Law Schools* (Indianapolis: Office of the Consultant on Legal Education, 1999) [hereinafter *Standards*]. All these documents are available at <<http://www.abanet.org/legaled/>>.

72. All of the details for this and much more are found in the "Rules of Procedure for Approval of Law Schools", *ibid*.

73. H. Ramsay Jr., "The History, Organization, and Accomplishments of the American Bar Association Accreditation Process" (1995) 30 Wake Forest L. Rev. 267 at 275.

74. *Supra* note 64 is the most recent volume. See also <<http://www.abanet.org/legaled/>> which contains some of this information.

The Standards for Accreditation are composed of some basic standards followed by more detailed interpretation statements. The standards are quite wide ranging in scope, including rules dealing with the basic organization and administrative structure of a law school, the adequacy of the educational program that the school offers, the competence, size, and responsibility of the faculty, the admissions process and requirements for admission, the adequacy of the resources and services of the library, the adequacy of the physical and technological facilities of the school, and so forth.⁷⁵ While these standards have been revised from time to time, a major revision was instituted in 1973 and then more recently the standards have undergone significant changes in the wake of various pressures.

Before examining some of these recent developments, it might be useful to note that the standards have historically focused on structure and resources rather than mandating any particular curriculum. Standard 302, dealing with curriculum, required that students have one rigorous writing experience, instruction in professional skills, and instructions in the duties and responsibilities of the legal profession, as well as "instruction in those subjects regarded as the core of the law school curriculum."⁷⁶ No list of any courses is given as constituting the so called "core".

The pressures on the ABA accreditation system have been primarily generated by the argument that accreditation, particularly when resource based, can be viewed as a cartel, perhaps even an illegal anti-competitive one, designed to raise the cost of legal education for the benefit of law professors as opposed to the interests of students who pay the fees and the public in need of legal services.⁷⁷ In 1993 the Massachusetts School of Law at Andover was denied accreditation by the ABA because the school did not conform to numerous of the ABA standards. For example much of the teaching at the school was done by practicing lawyers, hired as adjunct professors. The ABA standards required a certain minimum student-faculty ratio and only full-time teachers on tenure track or with job security provided by long-term contracts were counted in computing the student/faculty ratio. The school also failed the standards for maximum course teaching loads, provisions for sabbatical leaves, and prohibitions on offering for credit bar review preparation courses. There were also insufficient numbers of days of teaching, inadequate safeguards limiting student employment, inadequate physical plant and library, and

75. See "Standards of Approval of Law Schools" *supra* note 71.

76. See for example, *Standards for the Approval of Law Schools* (Chicago: ABA, 1987) Standard 302.

77. See G.B. Shepherd & W.G. Shepherd, "Scholarly Restraints? ABA Accreditation and Legal Education" (1998) 19 *Cardozo L. Rev.* 2091.

violations of the admissions standards, particularly the failure to give the LSAT sufficient weight. The school claimed that it was simply trying to provide a low cost legal education for those who might not be able to afford it at more traditional schools, and also provide an education that was oriented to actually training lawyers for practice, rather than providing students with a more theoretical exposure to law as an academic subject.⁷⁸

Having been denied accreditation, which in effect meant that graduates of the school could only hope to practice in the few states which allow for alternative non-ABA approved education, the law school filed an antitrust suit against the ABA alleging that the accreditation power was being used to fix salaries of law professors and limit the range of duties that could be required of them, and to generally increase the costs of legal education so that entry to the profession was restricted, and in a way that clearly favoured the well to do.⁷⁹ In short, the current process involved a kind of monopolistic cartel in that accreditation was controlled and captured by the professors—the suppliers of services and operated in their own self-interest, rather than for purposes of really protecting the consumer law students by assuring a minimum standard of legal education.⁸⁰

Other commentators agreed that accreditation could be seen as a cartel of law schools monopolizing the market for legal training, the market for hiring of law faculty, the market for legal services, and the internal market of university funding allocation.⁸¹ While the ABA standards prohibited any for-profit schools to be accredited, and only allowed nonproprietary, non-profit private or public universities to run law schools, nevertheless the system might be viewed as a partnership of law professors who profit greatly by suppressing competition for their services and controlling wages and working conditions. Innovative, low cost law schools are suppressed, fewer places are available to enter the legal profession, and in the end the cost of legal services goes up, all of which benefits the economic interests of the current profession.

78. An overview and justification by various professors at M.S.L. is provided in A.T. Starkis, P. Dickinson & T. Martin, "Meeting the MacCrate Objectives (Affordably): Massachusetts School of Law" (1998) 48 J. Legal Edu. 229.

79. Complaint, *Massachusetts School of Law v. American Bar Association*, 937 F. Supp. 435 (E.D. Pa. 1996), (No. 93-6206).

80. The view that the process might violate antitrust law was made more than a decade before this law suit by H. First, "Competition in the Legal Education Industry (II): An Antitrust Analysis" (1979) 54 N.Y.U. L. Rev. 1049.

81. An extensive treatment of these four markets and the effect of accreditation is given by Shepherd & Shepherd, *supra* note 77.

The Massachusetts litigation stimulated a great deal of debate in the profession and the press.⁸² The President of the ABA, responding to newspaper editorials on the case stated:

The ABA standards for approval are about quality legal education, not costly legal education. Of the 182 law schools approved by the ABA, 84 public and private institutions charge lower tuition than does the Massachusetts School of Law. Those schools were able to satisfy our standards and still offer a more reasonably priced legal education than M.S.L. And the fact that ABA approved law schools graduate approximately 40,000 new lawyers each year, 43 percent of them women and 21 percent of them persons of color, hardly suggests that we limit opportunities for new people to become lawyers.⁸³

Even though the Massachusetts case was dismissed,⁸⁴ the Federal Department of Justice launched an investigation of the ABA accreditation process partly on the complaint of M.S.L., and eventually filed its own antitrust lawsuit against the ABA.⁸⁵ The Department of Justice alleged that the ABA restrained competition among professional personnel at ABA-approved law schools by fixing their compensation levels and working conditions, and by limiting competition from non-ABA-approved schools. The complaint further asserted that the ABA regulatory process had been captured by the legal academics.⁸⁶

Despite serious questions about whether accreditation of educational institutions is subject to antitrust laws in the first place in the way that commercial enterprises are, the ABA nevertheless promptly settled this case by a consent decree.⁸⁷ Without admitting wrongdoing, the ABA

82. An overview is provided by P.J. Kolovos, "Antitrust Law and Nonprofit Organizations: The Law School Accreditation Case" (1996) 71 N.Y.U. L. Rev. 689.

83. P.S. Anderson, President of the ABA, "Press Release" 1 October 1998, found at <<http://www.abanet.org/legaled/>>.

84. *Massachusetts School of Law v. American Bar Association*, 853 F. Supp. 837 (E.D. Pa. 1994) and 937 F. Supp. 435 (E.D. Pa. 1996). See "Judge Rules ABA Has Right to Accredite" (November 1996) 82 A.B.A.J. 32. The litigation was hard fought. The law school unsuccessfully brought an action to have the trial judge removed: See *Massachusetts School of Law v. American Bar Association*, 872 F. Supp. 1346 (E.D. Pa. 1994). Then the school defied discovery orders: See *Massachusetts School of Law v. American Bar Association*, 914 F. Supp. 1172 (E.D. Pa. 1996). Then the school launched a new action in Massachusetts at the state court level: See *Massachusetts School of Law v. American Bar Association*, (Mass Supr. Ct. 1995) (No 95-2117). After losing the case, the school appealed and lost again: *Massachusetts School of Law v. American Bar Association*, 142 F.3d 26 (1st Cir. 1998). The federal case was unsuccessfully appealed in the third circuit and cert. was denied by the Supreme Court: See *Massachusetts School of Law v. American Bar Association*, 107 F.3d 1026 (3d Cir. 1997), cert. denied, 118 S. Ct. 264 (1997).

85. *United States v. American Bar Association* No. 95-1211 (D.D.C. filed 27 June 1995).

86. J. Klein, "Competitive Impact Statement" (1996) 915 PLI/Corp 689.

87. Published in 60 Fed. Reg. 39, 421 (1995). Also "Draft Final Judgment" *United States v. American Bar Association* 934 F. Supp. 435 (D.D.C. 1996) (No. 95-1211).

agreed to remove a number of standards including any consideration of faculty salaries in accreditation, and the ABA promised that it would no longer gather and share salary data. While the then existing ABA standard did not set any particular salary floor, it required schools to offer salaries that were "sufficient to attract and retain persons of high ability and . . . reasonably related to the prevailing compensation of comparably qualified private practitioners and government attorneys and of the judiciary [and] comparable with that paid to law school faculty members . . . in the same general geographical area."⁸⁸ The effect of the standard was arguably a form of price fixing that put a constant upward pressure on faculty salaries.⁸⁹ That American law professors are much better paid than Canadian ones can be attributed in part to this accreditation standard. The ABA agreed to abolish that standard and also to reform the process so that not more than half of the accreditation players would be law professors and deans. In addition the ABA promised to review the standards relating to student-faculty ratios, maximum teaching loads, mandatory sabbaticals, the prohibition on bar review courses, library resources and facilities. Indeed as a result of the consent decree the standards on these matters were recently substantially revised.⁹⁰ This consent decree was very controversial and many law deans and professors opposed it.⁹¹ After the settlement, the chair of the ABA Section on Legal Education resigned in protest.⁹²

While this antitrust attack on the current accreditation process commenced, an assault on the system was also launched, not by the unaccredited, but rather by powerful voices within accredited schools. The deans of 14 law schools, (many of them elite ones such as Harvard, Chicago and Stanford) wrote a letter in 1994 to other law school deans and the ABA criticizing the accreditation process as "overly intrusive, inflexible, concerned with details not relevant to school quality . . . and terribly costly in administrative time as well as actual dollar costs to schools."⁹³ The deans complained that the process focused on inputs, for example, how many seats were available in the library for student study, rather than on outputs—"about the sort of graduates we produce, about the sort of lives they will lead, about the consequences of our writing and teach-

88. Former standard 405 (a).

89. See A. Portinga, "ABA Accreditation of Law Schools: An Antitrust Analysis" (1996) 29 U. Mich. J.L. Reform 635 at 657.

90. "One Antitrust Battle Over" (August 1996) 82 A.B.A. J. 44. See also Shepherd & Shepherd *supra* note 77 at 2155.

91. See J. Welch Wegner, "Two Steps Forward, One Step Back: Reflections on the Accreditation Debate" (1995) 45 J. Legal Edu. 441.

92. K. Myers, "Official Quits" *National Law Journal* (17 July 1995) A6.

93. J.A. Sebort, "Introduction to Symposium on Accreditation" (1995) 45 J. Legal Edu. 415.

ing.”⁹⁴ Several of the deans subsequently expanded their criticisms by writing articles on the accreditation process.⁹⁵ One recent commentator suggests that the number of disaffected deans rose from the original 14 to up to 100.⁹⁶

Some deans responded to the attack from within. The Dean of Howard Law School asserted that “[e]limination of, or even a dramatic change in, A.B.A. accreditation would be nothing less than disastrous for the overwhelming majority of American law schools.”⁹⁷ The Dean of the University of Baltimore faculty stated that while improvements could be made:

[I] begin with the clear conviction that both the ABA accreditation process and the membership review process of the AALS have helped produce dramatic improvements in legal education over the past quarter century. That progress has resulted both from the standards that are imposed and from the reflection and planning that the sabbatical site evaluation process compels schools to undertake.⁹⁸

Despite such support, the accreditation process continued to come under pressure. Just after having to deal with the Massachusetts case, the Federal Justice Department consent decree, and criticism from within, the Federal Department of Education began to investigate the accreditation process because the Department relied on the ABA system for purposes of giving federal loans and grants to law students. In the wake of changes to the federal *Higher Education Act*, the ABA revised its law school accreditation standards at its mid-year meeting in Los Angeles in February of 1999.⁹⁹ While the Justice Department had been upset that the process was dominated by law professors, the Education Department was upset that the process was dominated by lawyers generally, who arguably created a cartel to restrict the numbers of people entering the profession. To undercut the argument that the trade association itself was using accreditation as a means to control entry into the profession, the ABA

94. “An Open Letter to the Deans of the ABA Accredited Law Schools” reprinted in (1994) M.S.L. L. Rev. 48 at 49-50.

95. R.A. Cass, “The How and Why of Law School Accreditation” (1995) 45 J. Legal Edu. 418; R.W. Bennett, “Reflections on the Law School Accreditation Process (1995) 30 Wake Forest L. Rev. 379; R.A. Matasar, “Perspectives on the Accreditation Process: Views from a Nontraditional School” (1995) 45 J. Legal Edu. 426.

96. Shepherd & Shepherd, *supra* note 77 at 2155.

97. Ramsey, *supra* note 73.

98. J.A. Sebert, “Modest Proposals to Improve and Preserve the Law School Accreditation Process” (1995) 45 J. Legal Edu. 431 at 433.

99. M. Neil, “ABA Revamps Law School Accreditation” (1999) 145 *Chicago Daily Law Bulletin* no. 30, (12 February 1999).

House of Delegates decided that they would no longer have the final say about which schools do or do not get accredited. Rather the Council of the ABA Section of Legal Education and Admission to the Bar would make such final decisions on their own.

What is clear from all of the combinations of these developments is that the ABA Standards have undergone major revision but are still subject to a current volatile and unstable context which might result in more changes. A Commission that was established by the ABA itself to review the standards and process of accreditation reported in August of 1995. Among other things the Commission

[s]uggested . . . imposing a requirement that schools “offer to all students instruction in professional skills” of a variety of types, counting additional personnel (including administrators and adjuncts) in the calculation of student-faculty ratios, eliminating standard limitations on teaching assignments, modifying standards governing physical plant and financial resources, and deleting references to faculty compensation . . . and clarifying that only violations of standards could jeopardize a school’s accreditation (not failure to meet its aspirations).¹⁰⁰

Without going through any systematic review of the current standards in terms of changes that have been made, we should note at least that the curriculum standards include various detailed rules on evaluation of students, length of the teaching terms and exact minutes of instruction time required to graduate, and the regulation of field placements and the like.¹⁰¹ But for our purposes what is noteworthy is that the standards continue to support diversity in curriculum by having no list of required skills courses or doctrinal courses other than the writing experience and the ethics course.¹⁰²

Chapter four of the Standards dealing with the qualification, size, responsibilities and working environment of faculty has been substantially revised. The controversial provision on compensation has been reduced to the principle that “[a] law school shall establish and maintain conditions adequate to attract and retain a competent faculty.”¹⁰³

b. American Association of Law Schools Accreditation

A review of the ABA accreditation controversy leads me to venture a tentative conclusion which might be of use as we contemplate accreditation in Canada. One of the reasons to fear a formal accreditation program is that standards will be seen as justified when they are directly related to

100. As summarized by Wegner, *supra* note 91 at 444.

101. See Chapter 3, “Program of Legal Education” in *Standards*, *supra* note 71.

102. Standard 302, *ibid*.

103. Standard 405 (a), *ibid*.

the improvement of training for lawyers, but will be seen as self serving when they are related to the production of legal scholarship. This is a curious twist of fate. The function of law schools includes doing critical research that helps to reform the law and make it more responsive to social needs. Arguably this purpose is every bit as important to the public, if not more so, than is the production of practitioners. Indeed it might be far better to reform areas of the law and the legal system than to provide more lawyers so as to allow people access to the unreformed process. It is ironic that standards related to scholarship are considered self-serving while standards related to lawyer production are not. This twist of fate has the potential to feed into the trade school mentality of legal education, rather than fostering ideals of scholarly institutional excellence. In much of the antitrust literature critical of law school accreditation, the argument is repeatedly made that the limitations on teaching loads means that the per hour wage of law professors are astounding, as if the whole point of the function of law schools was to train lawyers pure and simple. Sabbatical leaves and teaching terms of only 30 weeks are said to be obvious examples of law professors forming a cartel to increase their leisure at the expense of students who pay the tuition. The idea that law professors have a wider public role in the profession itself and in the public sphere to shine the light on the whole enterprise and advance knowledge and suggest reform of the law for the benefit of all of society, is never mentioned.¹⁰⁴ Course load restrictions and sabbaticals are seen as a conspiracy to limit the work of professors, rather than providing the conditions to do the work of scholars!

But if in the name of cartel-busting the focus of ABA accreditation has changed, or at least been modified, the point is that there is still the AALS accreditation process and standards which arguably could be maintained with a focus on setting standards for the wider mission of the law school. Given that most law schools have a powerful incentive to be associated with the AALS, the costs and benefits of accreditation can continue irrespective of what the ABA does, although admittedly there may be some schools that will concern themselves only with ABA accreditation. While the monopoly argument is less powerful, almost all law schools are still affiliated with the AALS, and thus it is curious that so much controversy has surrounded the ABA standards, while the AALS process is rarely mentioned at all in regard to being potentially a cartel, even if it is a voluntary one. As the ABA process is pared down, the AALS process may take on more significance.

104. See for example, Shepherd & Shepherd, *supra* note 77, and Portinga, *supra* note 89.

Unlike the ABA standards, the AALS standards for membership have undergone no radical change but have been incrementally revised from time to time.¹⁰⁵ The standards are “intended to reflect the Association’s distinctive role as a membership association that emphasizes faculty scholarship, teaching quality, and institutional efforts to assure an intellectual community, while according appropriate respect for the autonomy of its member schools.”¹⁰⁶ The standards are formulated as Bylaws of the Association supplemented by more detailed Executive Committee Regulations. The basic standards as found in Article Six of the Bylaws are subdivided into standards relating to the following headings: Admissions, Design and Mission of Juris Doctor Degree Program, Faculty, Law School Governance, Faculty Development, Curriculum, Library, Physical Facilities and Financial Resources.

The bylaw standards, like the ABA Standards, are sometimes expressed as general principles with a high level of generality. For example, as to admissions, “A member school shall admit only those applicants who appear to have the capacity to meet its academic standards.”¹⁰⁷ Further, “[a] member school shall seek to have a faculty, staff and student body which are diverse with respect to race, color, and sex. A member school may pursue additional affirmative action objectives.”¹⁰⁸ As to faculty compensation, the bylaw includes the statement, “To attract and retain a competent faculty that will devote its full energies to legal education, a member school shall pursue a policy of compensation and provision for financial security that takes fully into account the fact that law teachers are qualified by training and experience for other careers in the legal profession.”¹⁰⁹ There are other standards that have a greater degree of specificity. For example, a school must have a full-time dean,¹¹⁰ at least two-thirds of the program must be taught by full-time faculty,¹¹¹ teaching loads must not exceed eight scheduled class hours per week,¹¹² and the school must not teach bar admission preparation courses.¹¹³

105. As found in *Handbook*, *supra* note 62.

106. Article 6., “Requirements of Membership”, Section 6-1. “Program Objectives” Bylaws of the AALS, *ibid.*

107. *Ibid.* at Section 6-2 a.

108. *Ibid.* at Section 6-4 c.

109. *Ibid.* at Section 6-8 f.

110. *Ibid.* at Section 6-5 b.

111. *Ibid.* at Section 6-5 d.

112. *Ibid.* at Section 6-8 b.

113. *Ibid.* at Chapter 7.4 of the Executive Regulations

My purpose here is not to review the specific standards, which often simply parallel in a significant way what the ABA Standards used to be or what they currently are, but rather to note that they do foster the academic mission. For example, in terms of Faculty Development, Section 6-8 c. states:

A member school shall assist its faculty to discharge their responsibility to advance as well as to transmit ordered knowledge. To determine whether a school is fulfilling this obligation, the following factors shall be considered:

- (i) Recognition accorded creative scholarship in the appointment and advancement of members of the faculty;
- (ii) Number of teaching hours and subject matter areas for which each faculty member is responsible;
- (iii) Policies and practices concerning teaching loads, relief from committees or administrative assignments, and compensated or uncompensated leaves of absence in order to permit the faculty member to engage in creative scholarship;
- (iv) Policies and practices concerning financial support for research assistants, field studies, travel, and related research activities;
- (v) Adequacy of secretarial and library staff assistance; and
- (vi) Percentage or amount of school's budget allocated to research.¹¹⁴

In terms of curriculum and pedagogy, the AALS standards do not differ much from the ABA standards, in that no shopping list of courses or specific practice skills is required. Rather, Section 6-9 states:

- b. A member school shall offer a program of instruction that will assure that its students have a comprehensive understanding of legal institutions and an appreciation for the role of law and lawyers in society, and are academically qualified to participate effectively and responsibly in the legal profession.
- c. A member school shall provide varying methods of instruction related to its curricular objectives. These shall include significant opportunities for instruction on an individual or small-group basis and for instruction regarding client representation.
- d. A member school shall offer courses in a wide variety of fields often enough to afford students an opportunity to participate in them and shall assure that every student receives significant instruction in legal writing and research.¹¹⁵

114. *Ibid.* at Section 6-8 c.

115. *Ibid.* at Section 6-9.

Other standards relating to curriculum have recently been added as Chapter Seven of the Executive Committee Regulations. Rather than mandating doctrinal courses, the emphasis is on skills and perspectives:

7.3 Course Content

a. Member schools shall offer courses in a wide variety of subject matters, and provide students with an opportunity to study some areas of the law in depth and to gain an understanding of the lawyer's professional responsibility. Member schools are encouraged to offer additional instruction in dispute resolution, planning and problem solving, drafting, and counseling.¹¹⁶

As we look at AALS accreditation, obviously one of the questions in the context of increased globalization is whether Canadian law schools should work toward using the AALS as our own accreditation body, presuming that the AALS would be willing to open up full membership to Canadian schools. Obviously, AALS accreditation raises a red flag for a bull of issues dealing with Canadian identity, autonomy, diversity and sovereignty that go beyond the scope of this paper.

Conclusion

Given the longstanding ranking of schools into a small group of elite schools, and various combinations of lesser ranks, we probably think that in the United States there is a massive hierarchy in terms of law school quality and far more disparities between schools as compared with Canada. But aside from California, one might actually argue the opposite. Of course there is great diversity of programs, resources, missions, and so forth as between schools, and a ranking of prestige, but because of the national accreditation process, all approved law schools in the United States must achieve certain minimum standards, which means that the potential range of the hierarchy of schools is moderated to a considerable degree. Competition between schools obviously exists, but arguably both the AALS membership requirements and the ABA accreditation standards prevent a degree of gross disparity that would exist without them.

Accreditation is just another form of regulation and I do not think that any Canadian law deans in their right minds would, after reading all the ABA and AALS standards and rules of procedure, welcome the challenge of trying to conform to some such scheme. If leadership on the issue of accreditation is to come from somewhere it will not be from the law deans, whose responsibilities are already overwhelming and for whom an accreditation scheme just signals more trouble. But for the reasons that I have noted, I suggest that we at least need to think about what the benefits

116. *Ibid.* at Chapter 7.3 of Executive Regulations.

of accreditation would be before we too quickly conclude that the burdens outweigh the benefits.

In any case, without making any moves on the accreditation issue, I have suggested that we need to think of ways to cooperate at the national level instead of rushing into an increased competition to gain ranking advantage. I have also suggested that while a national accreditation system is a Pandora's box of problems, there are events on the horizon which might lead the profession itself to move toward a national system. If this is going to happen, law schools must be prepared to study the issue carefully. We may not want standards, but if they are going to be formulated I would hope that they reflect the tension, by upholding both the broader scholarly academic mission of law schools and the vocational needs of competence in terms of doctrine, values and skills.